

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GAVONNER ANDRE DUNIGAN,

Defendant-Appellant.

UNPUBLISHED

April 19, 2012

No. 300441

Oakland Circuit Court

LC No. 2010-232011-FH

Before: MARKEY, P.J., and MURRAY and SHAPIRO, JJ.

PER CURIAM.

Defendant was convicted by a jury of breaking and entering with the intent to commit larceny, MCL 750.110, for which he was sentenced as an habitual offender, fourth offense, MCL 769.12, to 36 months to 15 years' imprisonment. He appeals by right. We affirm.

Defendant was convicted of breaking and entering a vacant house with the intent to commit larceny. The principal issue at trial was identity. The main prosecution witness, Jeffrey Manetta, lived across the street from the vacant house. Manetta testified that at approximately 10:30 a.m. on a sunny morning, he observed an older van turn around and soon thereafter saw it parked in front of the vacant house. Manetta watched from his house and saw a man attempt to gain entry into the vacant house. When the man was unsuccessful in gaining entry, he walked toward the van and reemerged with a duffle bag. The man removed a crowbar from the duffle bag and used it to pry open the front door. At that point, Manetta called the police, who arrived within minutes. After officers entered the house, Manetta observed the same man he saw previously emerge from a pile of debris in the backyard and jump a privacy fence. Seconds later, Manetta alerted police officers when he saw the same man walking down the street. After the police detained defendant, the police conducted an on-site identification, and Manetta identified defendant as the man he saw break into the vacant house and jump the fence. Manetta was unable to identify defendant by his face, but was able to identify him by his physique, height, weight, pants, race, and hair. A search of defendant also revealed that he had possession of the keys to the van that was parked in front of the vacant house. The defense presented the testimony of defendant's girlfriend, who testified that she owned the van and that defendant was in the area to collect bulk trash.

I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that there was insufficient evidence to identify him as the person who broke and entered the vacant house. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). “[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict.” *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Identity is an essential element in a criminal prosecution and must be proved beyond a reasonable doubt. *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). Positive identification by a witness or circumstantial evidence and reasonable inferences arising from it may be sufficient to support a conviction of a crime. *Id.*; *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). The credibility of identification testimony is for the trier of fact to resolve and this Court will not resolve it anew. *Id.*

Manetta identified defendant within a short time after observing a man break and enter the vacant house. Manetta observed an older van parked in front of the house and a black male, about 5’6” to 5’8,” weighing about 150 pounds, wearing newer-looking blue jeans and a cream-colored t-shirt, attempt to gain entry into the house by turning the front door knob. When the man was not successful, he walked to the van, reemerged with a dark duffel bag, returned to the front door, opened the bag, pulled out a crow bar, pried open the door, and entered the vacant house. During the criminal episode, Manetta was about 60 to 70 feet from the porch of the vacant house. It was a sunny morning, and Manetta stated that nothing obstructed his view. After the man went inside the vacant house, Manetta called the police, who arrived “very quickly,” in less than five minutes. As the officers entered the house, Manetta observed a man emerge from debris of “clothes, garbage and some other stuff” in the backyard and jump a privacy fence. Manetta described the man as having the same short black hair, weight, height, and jeans as the person he earlier saw pry open the front door. Manetta “was convinced” that the fleeing man was the same person he saw enter the home with the crow bar. Manetta then noticed defendant walking down the street a few houses away. Manetta explained that although defendant was wearing a t-shirt that appeared to be a brighter-color, possibly yellow, he was the same height, weight, and wearing the same jeans as the man he saw enter the house and jump the fence. Manetta explained that although he did not see defendant’s face, he was able to identify him from his physique, blue jeans, race, and hairstyle. Officers observed that when they approached defendant, he was walking briskly in the area and sweating profusely, which was unusual given the weather conditions. One officer explained that defendant was wet and sweat was dripping down his eyebrows. In addition to Manetta’s identification testimony, defendant was also in possession of the keys to the van parked in front of the vacant house. Manetta also testified that the person he observed retrieved a duffel bag containing a crowbar from that van before breaking into the house, and the police found a duffel bag containing a crowbar and various tools inside the vacant house.

Viewed in a light most favorable to the prosecution, this evidence was sufficient to establish defendant’s identity as the perpetrator. Although defendant argues that Manetta’s

identification testimony was not credible, this was for the jury to resolve. *Davis*, 241 Mich App at 700. The same challenges to the identification testimony that defendant raises on appeal were made to the jury during opening statement, cross-examination, and closing argument. We will not interfere with the jury's role of determining issues of weight and credibility. *Wolfe*, 440 Mich at 514. Rather, we must draw all reasonable inferences and make credibility choices in support of the jury's verdict. *Nowack*, 462 Mich at 400. The evidence here was more than sufficient to support defendant's conviction.

II. ON-SCENE IDENTIFICATION

Defendant next argues that the trial court erred by failing to hold a *Wade*¹ hearing to determine the validity of Manetta's on-the-scene identification, which defendant contends was unduly suggestive because Manetta could not identify him by face. We conclude that defendant waived any right to a *Wade* hearing by expressly agreeing to proceed to trial without one. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). On the first day of trial, defense counsel informed the court that "there is no *Wade* Hearing issue." Further, defense counsel stated, "[t]here is nothing to indicate that there was improper police conduct that affected [sic] an in-court identification as per *Wade*." Counsel continued by stating there was nothing about the police's conduct of an on-scene identification that was improper. Under oath, defendant agreed with defense counsel's assessment. By expressly agreeing to proceed to trial without a *Wade* hearing, defendant waived any right to such a hearing. *Id.* Defendant's waiver extinguished any error. *Id.* at 216.

III. DEFENDANT'S STATEMENTS

Defendant also argues that statements he made to the police at the scene were improperly introduced against him because they were made during a custodial interrogation and he was not advised of his *Miranda*² rights. Because defendant did not object to the introduction of his statements at trial, this issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

General, on-the-scene questioning by law enforcement officers to investigate the facts surrounding a crime does not necessarily implicate *Miranda* warnings. *People v Ish*, 252 Mich App 115, 118; 652 NW2d 257 (2002). *Miranda* warnings are not required unless the accused is subject to a "custodial interrogation." *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Kulpinski*, 243 Mich App 8, 25; 620 NW2d 537 (2000). A custodial interrogation occurs when law enforcement officers initiate questioning after the accused "has been formally arrested or subjected to a restraint on freedom of movement of the degree associated with a formal arrest." *Id.* Whether the accused was in custody depends on the totality of the objective circumstances, and the key question is whether the accused could reasonably

¹ *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

² *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

believe that he was not free to leave. *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999).

Under the totality of the circumstances here, defendant's statements were the product of a custodial interrogation. The testimony established that an officer approached defendant with his weapon drawn, instructed defendant to drop facedown, handcuffed defendant, and informed defendant that he was being detained for investigation purposes. Defendant was handcuffed as the officers questioned him about his residence and reasons for being in the area. Defendant remained handcuffed as an officer left to investigate whether defendant's explanation for his presence was truthful. Defendant also remained handcuffed as the officers conducted the on-the-scene identification. Thus, defendant was handcuffed from the time the officers approached him until he was formally arrested. Even though defendant had not been formally advised that he was under arrest, the circumstances were the functional equivalent of a formal arrest because defendant reasonably would have believed he was not free to leave. Because no *Miranda* warnings were given before the custodial interrogation, defendant's statements were inadmissible. *Miranda*, 384 US at 479. Thus, defendant has established a plain error. To be entitled to relief, however, defendant must also establish that the evidence affected his substantial rights. *Carines*, 460 Mich at 763-764. Defendant bears the burden of showing actual prejudice. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006). Reversal is only warranted if the error resulted in the conviction of an actually innocent defendant or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of the defendant's innocence. *Carines*, 460 Mich at 763.

There is no reasonable likelihood that defendant's statements caused his conviction. The statements were not directly incriminating. Defendant's identity as the person who broke into the vacant house depended on the credibility of Manetta's identification testimony and physical evidence. Manetta testified that the person who broke into the vacant house obtained a duffle bag with a crow bar from the parked van, a duffle bag and a crow bar were found inside the vacant house, and the keys to the van were found in defendant's possession. Given this evidence, any error in the admission of defendant's statements did not affect the outcome of the trial. Therefore, appellate relief is not warranted.

IV. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that he was denied the effective assistance of counsel at trial. Because defendant did not raise an ineffective assistance of counsel claim in the trial court, our review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that the result of the proceeding would have been different but for counsel's error. *Id.*

A. FAILURE TO CHALLENGE MANETTA'S IDENTIFICATION

Defendant argues that trial counsel was ineffective for failing to request a *Wade* hearing to challenge Manetta's identification testimony. An evidentiary hearing is not required in every case in which an identification procedure is challenged, such as when the defendant fails to substantiate allegations of infirmity with factual support. *People v Johnson*, 202 Mich App 281, 285; 508 NW2d 509 (1993). Apart from pointing out that Manetta was unable to identify defendant by face, defendant does not explain why Manetta's on-the-scene identification should be considered improper or unduly suggestive. Defendant's argument regarding the lack of facial recognition involves the reliability of Manetta's identification testimony, which is primarily a question for the jury. *Id.* at 286. Defendant has not identified any act by the police that improperly suggested that defendant was the perpetrator. Thus, defendant provides no basis on which counsel could have challenged the on-the-scene identification as unduly suggestive or improper. Counsel was not ineffective for failing to make a futile motion. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant also argues that trial counsel should have requested a corporeal lineup. A defendant has a right to a lineup "when eyewitness identification has been shown to be a material issue and when there is a reasonable likelihood of mistaken identification that a lineup would tend to resolve." *People v McAllister*, 241 Mich App 466, 471; 616 NW2d 203 (2000). Had trial counsel asked for a live lineup, it would not have made a difference in the outcome of the trial. Identification was a material issue, but Manetta never claimed to be able to identify defendant by his face and the jury was fully informed of this circumstance. There was no need to conduct a lineup to establish this uncontested point. Under the circumstances, trial counsel's failure to request a corporeal lineup was not objectively unreasonable or prejudicial. *Effinger*, 212 Mich App at 69.

Defendant further contends that trial counsel should have objected to Manetta's in-court identification, which was based on the on-the-scene identification. "The need to establish an independent basis for an in-court identification arises where the pretrial identification is tainted by improper procedure or is unduly suggestive." *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995). Here, there is no evidence of improper or unduly suggestive pretrial identification procedures. So, it was not necessary to determine whether an independent basis for Manetta's in-court identification existed. Objection to Manetta's testimony on this basis would have been futile. See *Snider*, 239 Mich App 425.

B. DEFENDANT'S STATEMENTS

Defendant argues that trial counsel was ineffective for failing to move to suppress his statements on the ground that they were obtained in violation of his *Miranda* rights. As discussed in section III, *supra*, the testimony regarding defendant's statements, although improper, did not affect defendant's substantial rights. Therefore, trial counsel's failure to object to the testimony was not prejudicial. Because defendant's identification as the perpetrator was dependent upon the credibility of Manetta's testimony, and defendant's identity was also established through his possession of the keys to the van, there is no reasonable probability that the result of the proceeding would have been different had defendant's statements been suppressed. Therefore, defendant cannot establish a claim of ineffective assistance of counsel on this basis.

C. MAURICE JONES

Defendant's last ineffective assistance of counsel claim is that trial counsel was ineffective for failing to call Maurice Johnson as a witness. The record indicates that Johnson gave a statement to the police in which he reported that he observed a car and a man at the vacant house wearing black jeans and a black and white t-shirt. He then saw a man come out from the house at 10260 Albany and then saw a man in a yellow shirt and blue jeans walking down the street.³

The record indicates that trial counsel was aware of Johnson's statement, but the record does not disclose why counsel ultimately did not call Johnson as a witness. The decision whether to call a witness is a matter of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Johnson's statement was very brief, sketchy, and did not directly contradict Manetta's observations. Trial counsel addressed Johnson's observations during trial and elicited from Sergeant Barnard that the suspect Johnson described did not match defendant's description, that no one was found who matched that description, and that the black and white checkered shirt was found. In closing argument, defense counsel used Johnson's absence at trial to highlight the weakness of the prosecution's case. Defendant has not overcome the strong presumption that counsel chose not to call Johnson at trial as a matter of strategy. *Sabin*, 242 Mich App at 659. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

V. THE PROSECUTOR'S CONDUCT

Defendant argues that he is entitled to a new trial because of the prosecutor's misconduct before and during trial. We disagree. Defendant did not preserve this issue by objecting below to the prosecutor's conduct. We review unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). We will not reverse if the alleged prejudicial effect of the prosecutor's conduct could have been cured by a timely instruction. *Id.*

A. PROSECUTOR'S OPENING STATEMENT

Detective James Vernier testified at the preliminary examination that as he was booking a different prisoner, he overheard defendant comment that he "didn't know how he could be in custody for home invasion since there was no stove or refrigerator inside the house that he was accused of going into." Before trial began, the trial court ruled that Detective Vernier could be added to the prosecutor's witness list, but his testimony would be limited to what he overheard. In opening statement, the prosecutor stated that the jury would hear that Detective Vernier overheard defendant make an incriminating statement. During the detective's subsequent direct examination, however, the trial court sustained defense counsel's objection and precluded testimony concerning defendant's statement. Defendant now argues that the prosecutor acted

³ The vacant house was located at 22730 Manistee.

improperly by referring to Detective Vernier's proposed testimony, which ultimately was not admitted at trial. We find no merit to this issue.

"The purpose of an opening statement is to tell the jury what the advocate proposes to show." *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976). When a prosecutor states that evidence will be presented that later is not presented, reversal is not required if the prosecutor acted in good faith and the defendant was not prejudiced by the statement. *People v Wolverton*, 227 Mich App 72, 76-77; 574 NW2d 703 (1997). Here, the prosecutor clearly acted in good faith during opening statement on the basis of the trial court's pretrial ruling that defendant's statement would be admissible. Further, defendant was not prejudiced. After the trial court sustained defendant's objection, the prosecutor asked no further questions of the witness and made no related references in closing argument. The trial court also instructed the jury that it must decide the case based only on the properly admitted evidence and that the lawyers' statements were not evidence. The court's instructions were sufficient to dispel any possible prejudice. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). It is well established that jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

B. ALLEGED DUE PROCESS VIOLATION

Defendant next argues that the prosecution violated his due process right to favorable evidence under *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963), when it (1) failed to produce Johnson's police statement, (2) failed to retain physical custody of, and introduce at trial, the blue jeans that defendant was wearing at the time of booking, and (3) failed to photograph defendant's van.

A criminal defendant has a due process right of access to certain information possessed by the prosecution if that evidence might lead a jury to entertain a reasonable doubt about a defendant's guilt. *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). "Impeachment evidence as well as exculpatory evidence falls within the *Brady* rule because, if disclosed and used effectively, such evidence 'may make the difference between conviction and acquittal.'" *Id.*, quoting *United States v Bagley*, 473 US 667, 676; 105 S Ct 3375; 87 L Ed 2d 481 (1985). To establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence and could not have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *Lester*, 232 Mich App at 281-282.

Defendant has not established a *Brady* violation. There is no indication that the prosecutor suppressed Johnson's police statement. During trial, defense counsel questioned Sergeant Michael Barnard about Johnson's observations and referred to Johnson's observations during the defense motion for a directed verdict and in closing argument. Thus, the record shows that the defense was aware of Johnson's statement and could have elected to call Johnson as a witness. Moreover, given that the jury was aware of the substance of Johnson's statement and the evidence against defendant, including his possession of the keys to the van, any alleged delay

in providing Johnson's statement was not outcome determinative. Consequently, defendant has failed to show an error, plain or otherwise.

Defendant contends that the police should have retained his jeans to show that they were a lighter color and should have photographed his van to show that it was legally parked and contained no stolen items from the vacant house. Defendant's argument confuses the prosecutor's duty to disclose evidence to a defendant with a duty to develop evidence for a defendant. See *People v Coy (After Remand)*, 258 Mich App 1, 22; 669 NW2d 831 (2003). In the absence of "a showing of suppression of evidence, intentional misconduct, or bad faith," due process does not require that the prosecution to preserve evidence, or to seek and find exculpatory evidence for a defendant's benefit. *Id.* at 21.

In this case, defendant does not contend that the evidence was suppressed, and there is no basis in the record for finding any bad faith or intentional misconduct by the police or prosecutor. At trial, Sergeant Barnard testified that clothing is sometimes taken and held as evidence, but in this case the county jail released defendant's clothing to someone other than an officer or detective. Further, the yellow shirt and jeans that defendant claimed he was wearing on the day of the offense were admitted at trial, and Sergeant Barnard indicated that the clothing appeared to be the same clothing that defendant was wearing when he was arrested at the scene. With regard to photographing the van, no evidence at trial suggested that any items stolen from the vacant house would have likely been inside the van. Further, the police testimony at trial established that the van was legally parked. Defendant has not explained how a photograph of the van would have changed the outcome of trial. Accordingly, there is no basis for concluding that the police suppressed exculpatory evidence or acted in bad faith in not retaining the jeans or photographing the van. Thus, defendant's due process rights were not violated.

C. DEFENDANT'S "TAINTED" IDENTIFICATION AND STATEMENTS

As discussed in section II, *supra*, the on-the-scene identification was not impermissibly suggestive. Therefore, the prosecutor did not engage in any misconduct in presenting this evidence at trial.

Although we concluded in section III, *supra*, that defendant's statements were obtained in violation of his *Miranda* rights and, therefore, were inadmissible, "a prosecutor's good-faith effort to admit evidence does not constitute misconduct." *People v Dobek*, 274 Mich App 58, 72; 732 NW2d 546 (2007). The record shows that the officer testified that he drew his weapon because he could not see what was in defendant's hand. The officer also believed that his brief retention of defendant was proper and for investigatory purposes. Indeed, defense counsel did not even object to the testimony. There is no indication that the prosecutor's questioning of the officer regarding defendant's statements was done in bad faith. Furthermore, as explained previously, the admission of defendant's statements did not affect the outcome of the trial. Thus, defendant's substantial rights were not affected.

D. FALSIFYING DEFENDANT'S ARREST WARRANT

Defendant next contends that the prosecutor engaged in misconduct by authorizing the use of "falsified information" to obtain defendant's arrest warrant. Once again, defendant

merely relies on the fact that Manetta was not able to identify him by face. However, Manetta was able to identify defendant by his race, hairstyle, physique, t-shirt, and newer jeans. The arrest warrant was not based on untrue information, inasmuch as Manetta did identify defendant as the perpetrator. Thus, there was no misconduct.

VI. ADJOURNMENT

Defendant's last claim is that the trial court abused its discretion by denying defense counsel's motion to adjourn the trial to allow additional time to prepare for trial. The record does not support this claim. "No adjournments, continuances or delays of criminal causes shall be granted by any court except for good cause shown" MCL 768.2. A defendant must also show prejudice as a result of the trial court's alleged abuse of discretion in denying an adjournment. *Snider*, 239 Mich App at 421.

First, contrary to what defendant asserts on appeal, there is no record of a motion by trial counsel to adjourn trial. Instead, the record shows that defendant's prior attorney moved to adjourn trial because he had another trial scheduled. The trial court did not grant the adjournment, but instead appointed new trial counsel. There is no record of trial counsel ever indicating that she was unprepared or needed more time. To the contrary, the record shows that counsel appeared to be fully aware of the facts of the case, which were not overly complex. The record also indicates that, before trial, counsel visited and discussed the case with defendant and researched several pretrial issues, including whether a *Wade* hearing was required. On the first day of trial, counsel appeared prepared and asked defendant on the record if they were prepared to proceed to trial, and he answered, "Yes, I am." During trial, counsel thoroughly cross-examined Manetta regarding his identification of defendant, Sergeant Barnard regarding the identification procedure, and Officer John Lences about his questioning of defendant at the scene. In closing argument, counsel highlighted the lack of any facial identification of defendant, the inconsistencies in the description of defendant's clothing, Johnson's observations, and the overall lack of evidence in the prosecution's case. Defendant does not adequately explain what outcome-determinative action trial counsel could have taken if she had more time to prepare. On this record, there is no merit to defendant's claim that good cause for an adjournment existed, or that defendant was actually prejudiced by the lack of an adjournment.

We affirm.

/s/ Jane E. Markey
/s/ Christopher M. Murray
/s/ Douglas B. Shapiro